

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF MISSISSIPPI
WESTERN DIVISION

LOUISE H. BUTLER, JIMMY C. HALES
AND AMY RUTH KIDDY

PLAINTIFFS

V.

NO. 3:97CV23-B-A

PROVIDIAN LIFE AND HEALTH
INSURANCE COMPANY

DEFENDANT

MEMORANDUM OPINION

This cause comes before the court on the plaintiffs' motion to remand filed on February 24, 1997. This cause was removed on February 18, 1997 on the ground of diversity of citizenship jurisdiction. The court has duly considered the parties' memoranda and is ready to rule.

The complaint filed on January 21, 1997 alleges, inter alia, breach of an insurance contract and bad faith. The ad damnum clause seeks contractual damages in the sum of \$9,850 and \$90,000 for extra-contractual damages and punitive damages. The notice of removal asserts that the amount in controversy exceeds the sum of \$75,000, exclusive of interest and costs, as required under 28 U.S.C. § 1332(a).¹ The plaintiffs assert that the amount in controversy, as reflected in the amended complaint filed

¹Section 205 of the Federal Courts Improvement Act of 1996, P.L. 104-317 (1996), amended section 1332, increasing the threshold amount-in-controversy to \$75,000. The amendment applies to cases filed on or after January 17, 1997 and is therefore applicable to this cause.

contemporaneously with the motion to remand, is less than the recently increased jurisdictional minimum. The ad damnum clause in the amended complaint seeks \$9,850 for contractual damages and \$64,650 for extra-contractual damages and punitive damages. The damages sought in the original complaint total \$99,850; the amended complaint seeks damages totaling \$74,500.

The amended complaint was filed six days after the removal and prior to the filing of any responsive pleading.² The plaintiffs assert that the removal of this cause is based on a pleading mistake which was corrected before the defendant filed an answer. The United States Supreme Court has explained:

If [the plaintiff] does not desire to try his case in the federal court he may resort to the expedient of suing for less than the jurisdictional amount, and though he would be justly entitled to more, the defendant cannot remove.

St. Paul Mercury Indem. Co. v. Red Cab Co., 303 U.S. 283, 294, 82 L. Ed. 845 (1938). The plaintiffs assert that at the time the original complaint was filed their counsel was under the mistaken impression that the federal jurisdictional threshold had been increased to \$100,000, instead of \$75,000. The amount of actual damages, based on the amount of proceeds allegedly due under the subject insurance policies was not amended. Only the amount of

²Under Rule 15(a) of the Federal Rules of Civil Procedure, "[a] party may amend the party's pleading once as a matter of course at any time before a responsive pleading is served."

extra-contractual and punitive damages was amended. The total figure in the original complaint just under \$100,000 and the amended total figure just under \$75,000 are consistent with the plaintiffs' assertion of their intent from the outset to seek to recover less than the recently amended jurisdictional minimum. "[A]s [a] general rule, a plaintiff may avoid federal diversity jurisdiction by pleading state court damages below the amount necessary to invoke diversity jurisdiction." Cross v. Bell Helmets, USA, 927 F. Supp. 209, 212 & n.5 (E.D. Tex. 1996) (citing Horton v. Liberty Mut. Ins. Co., 367 U.S. 348, 353, 6 L. Ed. 2d 890, 894 (1961)). See Allen v. R & H Oil & Gas Co., 63 F.3d 1326, 1335 (5th Cir. 1995) ("if a plaintiff pleads damages less than the jurisdiction amount, he generally can bar a defendant from removal").

Since removal jurisdiction is generally determined on the basis of the state court complaint at the time of removal, a plaintiff cannot defeat removal by amending the complaint. Cavallini v. State Farm Mut. Auto Ins. Co., 44 F.3d 256, 265 (5th Cir. 1995) (proposed amendment sought to allege a claim against a nondiverse defendant). "[A] plaintiff may not defeat removal by subsequently **changing** his damage request, because post-removal events cannot deprive a court of jurisdiction once it has attached." Asociacion Nacional De Pescadores a Pequena Escala o Artesanales De Colombia S.A. v. Dow Quimica De Colombia S.A.

[hereinafter ANPAC], 988 F.2d 559, 565 (5th Cir. 1993) (citing St Paul Mercury Indem. Co., 303 U.S. at 292), cert. denied, 510 U.S. 1041, 126 L. Ed. 2d 653 (1994). However, the Fifth Circuit allowed a post-removal affidavit limiting the amount of damages sought:

Under those circumstances, the court is still examining the jurisdictional facts **as of the time** the case is removed, but the court is considering information submitted after removal.

988 F.2d at 565 (unspecified amount of damages pled in the complaint). See Cross, 927 F. Supp. at 214 ("Damage stipulations filed before a federal district court has passed upon its determination of jurisdiction are permissible if they **clarify** as opposed to **amend** an original petition"). Since 28 U.S.C. § 1332(a), as amended, became effective only five days before commencement of this cause in state court, the court finds that the plaintiffs' amended complaint is obviously a mere correction of a good faith mistake, as opposed to a manipulative maneuver. The court further finds that the amended ad damnum clause manifests the plaintiffs' "commitment to recovery below the federal threshold." De Aquilar v. Boeing Co. [hereinafter De Aquilar II], 47 F.3d 1404, 1412 n. 10 (5th Cir.), cert. denied, 133 L. Ed. 2d 119 (1995). Mississippi law limits the plaintiffs' recovery to the amount plead but does not prohibit amendment of the ad damnum clause. Since the amended ad damnum clause is the basis of the instant motion to

remand, the court finds that the instant motion has the effect of a stipulation precluding the plaintiffs from increasing the ad damnum clause in state court. Accordingly, the plaintiffs are "legally bound to accept less" than the federal jurisdictional amount, as was intended upon commencement of this cause. Allen, 63 F.3d at 1335 n. 14.

For the foregoing reasons, the court finds that the motion to remand is well taken and should be granted.

An order will issue accordingly.

THIS, the _____ day of April, 1997.

NEAL B. BIGGERS, JR
UNITED STATES DISTRICT JUDGE